SEVERO LEON ET AL.
v.
ALBUQUERQUE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-208-A Decided March 23, 1993

Appeal from the retroactive approval of a conveyance of trust land.

Affirmed.

1. Indians: Lands: Individual Trust or Restricted Land: Alienation

The Secretary of the Interior has the authority to approve a conveyance of Indian trust or restricted land after the death of the Indian grantor if the Secretary is satisfied that the consideration for the conveyance was adequate; the grantor received the consideration; and there was no fraud, overreaching, or other illegality in the procurement of the conveyance.

2. Board of Indian Appeals: Jurisdiction--Indians: Lands: Individual Trust or Restricted Land: Alienation

Decisions to approve or disapprove conveyances of Indian trust or restricted land are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, the Board does not substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

3. Indians: Lands: Individual Trust or Restricted Land: Alienation

In retroactively approving a conveyance of Indian trust or restricted property, the Bureau of Indian Affairs need not find that the conveyance complied in every respect with the statutes and regulations in force at the time of the conveyance, but must be satisfied that the fundamental intent of the statutes and regulations has been fulfilled.

4. Indian Probate: Inventory: Property Erroneously Excluded or Included

Indian probate regulations of the Department of the Interior establish a procedure by which property which was improperly included in an estate inventory may be eliminated from the inventory, even though probate proceedings have been concluded. 43 CFR 4.273.

5. Board of Indian Appeals: Jurisdiction--Indians: Lands: Generally

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine the validity of title to Indian land.

6. Administrative Procedure: Decisions--Indians: Lands: Individual Trust or Restricted Land: Alienation

In determining whether a change in law or in the interpretation of law should be given retroactive effect, the Board of Indian Appeals will consider: (1) the nature of the reliance placed upon the prior applications of law by the parties; (2) the harm or prejudice to those who relied upon previous principles of law; (3) the purpose of the law in light of public policy; and (4) the harm to the administration of justice or public purpose.

APPEARANCES: Sarah W. Barlow, Esq., and Daniel M. Rosenfelt, Esq., Albuquerque, New Mexico, for appellants; Robert C. Eaton, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Area Director; Lester K. Taylor, Esq., and Teresa Isabel Leger, Esq., Albuquerque, New Mexico, for the Pueblo of Laguna.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Severo Leon, Frank Leon, Wilbur Concho, Jr., Stanislaus Leon, Daisy Velasquez, and Kenneth G. Leon 1/ seek review of a July 14,

1/ Appellants' brief also shows Frank Dailey, Jr., as an appellant. However, Dailey was not included in appellants' notice of appeal and did not file a separate notice of appeal. In order to be entitled to pursue an appeal before the Board, one must first file a timely notice of appeal. E.g., Dudek v. Acting Assistant Portland Area Director, 23 IBIA 88, 89 (1992). Accordingly, the Board does not consider Dailey an appellant in this matter.

1992, decision of the Albuquerque Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the retroactive approval of a deed executed by Guachin Torres in 1908. The deed conveyed Torres' Indian homestead to the Pueblo of Laguna. Appellants are heirs of either Guachin (Jose) Torres, or Lupe Leon, as determined in Indian probate proceedings held in 1980 and 1985. 2/

For the reasons discussed below, the Board affirms the Area Director's approval of the deed.

Background

In 1886, Guachin Torres, a Laguna Indian, filed a homestead application for the N½ NE¼, and lots 1, 2, and 3 of sec. 36, T. 10 N., R. 7 W., New Mexico Principal Meridian, containing 147.51 acres. On March 2, 1893, he received Homestead Certificate No. 1923 for this land. The certificate recited that it was issued under the homestead laws and the Act of July 4, 1884, 3/ and that the property would be held in trust for Torres or his heirs for a period of 25 years.

On July 16, 1908, Torres executed a warranty deed conveying the property to the Pueblo of Laguna for the consideration of $1. The deed stated that it was signed in the presence of and delivered to William Paisano, Governor of the Pueblo, and V. G. Paisano, Secretary of the Pueblo. Two other individuals signed the deed as witnesses, and the deed was acknowledged before a notary public. On September 27, 1911, the deed was recorded in Valencia County, New Mexico.

No official of the Department of the Interior approved the conveyance. In fact, prior to 1960, BIA was unaware of either the homestead patent to

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2/ On Mar. 18, 1980, in Indian Probate IP GA 38G 79, Administrative Law Judge Patricia McDonald determined that the heirs of Guachin, or Jose, Torres were: Frank Leon, Severo Leon, Lupe Leon, Daisy Velasquez, Frank Dailey, Jr., and Wilbur (William) Concho, Jr. Lupe Leon died in 1982. On May 13, 1985, in Indian Probate IP GA 152G 84, Judge McDonald determined that Lupe Leon's heirs were Stanislaus Leon and Kenneth George Leon.

3/ This was the Indian Homestead Act of 1884, 23 Stat. 76, 96, which provided:

"That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; * * * All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made * * *."

Trust patents issued under this statute have been recognized as possessing the same legal status as allotments made under the General Allotment Act, 25 U.S.C. § 331 (1988). See United States v. Jackson, 180 U.S. 183 (1930).

Torres or the 1908 deed to the Pueblo. Both the Pueblo and BIA have consistently treated the land as tribal land. As explained in a June 5, 1992, letter from the Superintendent, Laguna Agency, BIA, to appellants' counsel:

> Rights-of-way have been granted with the consent of the Pueblo, and proceeds from those rights-of-way have been held in trust for, and expended for the benefit of, the Pueblo. In addition to rights-of-way for U.S. 66 and I-40, the Pueblo of Laguna Housing Authority has leased a portion of the land from the Pueblo and constructed HUD housing on it, and the Pueblo has assigned other lots to individual members. A community water well has been drilled on the land, and community irrigation ditches cross it. A community cemetery is located on it.

(June 5, 1992, Letter from Superintendent, Laguna Agency, at 2). See also List of Encumbrances and Improvements attached to Affidavit of Harold TeCube, Exhibit 10 to Area Director's Brief. This list shows that the first conveyance by the Pueblo--to the Atchison, Topeka and Santa Fe Railway Company--took place in 1910.

In 1960, BIA sought information from the Bureau of Land Management (BLM) concerning a number of land title matters on the Laguna Reservation. See March 31, 1960, letter from General Superintendent, United Pueblos Agency, BIA, to New Mexico State Supervisor, BLM. BLM's response indicated, inter alia, that "Lots 1, 2, 3 N½ NE¼, Sec. 36 [T. 10 N., R. 7 W., N.M.P.M.], are included in Indian Trust Patent 1923 dated 3-2-1893" (June 3, 1960, BLM Letter to General Superintendent).

In 1965, BIA obtained a copy of the trust patent and learned that it had been issued to Guachin Torres. Because the name "Guachin Torres" did not appear in any BIA records, BIA requested assistance from the Pueblo in identifying him and his heirs. The Pueblo did not respond to any of the three letters written by BIA between 1965 and 1977. By 1979, however, BIA had concluded that Guachin Torres was the same person as Jose Tores, who was listed on the 1910 census. 4/ BIA therefore referred the matter to Judge McDonald for a determination of Torres' heirs. As indicated in footnote 2, Judge McDonald made a determination of heirs on March 18, 1980.

In May 1980, the Pueblo located the 1908 deed in its files and furnished a copy to BIA. BIA sought advice from the Albuquerque Field Solicitor, who stated in a memorandum of June 10, 1980, that the deed was without effect because it had not been approved.

During the 1980's, BIA sought unsuccessfully to persuade appellants and the Pueblo to reach an agreement concerning the property, through a land exchange or otherwise. During this same period, appellants were evidently

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4/ The Pueblo suggests that Guachin Torres and Jose Tores may not have been the same person. See Pueblo's Brief at 8 n.6. For purposes of this decision, the Board assumes that they were one and the same.

contemplating a trespass action. Shortly after the March 1980 determination of heirs, they retained an attorney to look into that possibility. In 1988, appellants retained a different attorney and, in 1991, they retained their present counsel. In July 1991, their present counsel wrote to the Superintendent, requesting, inter alia, a survey of the property and an appraisal of the rights-of-way crossing it. Following further correspondence, and after learning that funds were not available for a survey or appraisal, appellant's counsel wrote to the Superintendent, invoking 25 CFR 2.8: 5/

> We must now call upon you to exercise your authority and discretion to take action to fulfill the duties of the Bureau of Indian Affairs to review all encumbrances, conveyances, assignments, and rights of way and to correct existing records with updated ones to reflect the heirs as the legal owners. In addition, compensation to the heirs must be provided so as to reimburse them for their deprivation of the use and enjoyment of the allotment, as well as such deprivation suffered by the Gauchin [sic] Torres estate.

(Counsel's Mar. 18, 1992, Letter). Counsel's request for action under section 2.8 was renewed in a letter dated March 30, 1992.

In the process of considering appellants' request, the Superintendent concluded that it was necessary to reexamine the history of the matter. Following such a reexamination, by memorandum dated May 28, 1992, the Superintendent recommended to the Area Director that the Area Director approve the 1908 deed retroactively. The Area Director approved the deed on June 5, 1992. 6/ In a memorandum of that date to the Superintendent, he explained his reasons for doing so.

The Superintendent wrote to appellants' attorney, also on June 5, 1992, and informed him of her recommendation to the Area Director and of the Area Director's approval of the deed. Appellants appealed to the Area Director

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5/ 25 CFR 2.8 provides:

"(a) A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, can make the official's inaction the subject of appeal, as follows:

"(1) Request in writing that the official take the action originally asked of him/her;

* * * * * *

"(b) The official receiving a request as specified in paragraph (a) of this section must either make a decision on the merits of the initial request within 10 days from receipt of the request for a decision or establish a reasonable later date by which the decision shall be made, not to exceed 60 days from, the date of request."

6/ The Area Director actually approved a copy of the deed, because the original was not then available. After this appeal was filed, the Pueblo located the original deed in its archives. The Area Director states that, if his decision is affirmed by the Board, he will approve the original deed.

in accordance with the Superintendent's instructions. In light of his earlier involvement in the matter, the Area Director issued a summary decision so that appellants could proceed to the Board. 7/

Appellants' notice of appeal was received by the Board on July 23, 1992. The Pueblo's motion to intervene was granted on September 2, 1992. Appellants, the Area Director, and the Pueblo filed briefs.

Discussion and Conclusions

[1, 2] The principles applicable here were established in Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 21, 89 I.D. 655 (1982). In that case, the Board held that

> the Secretary or his delegate has the authority to approve a conveyance of Indian trust lands after the death of the Indian grantor if the Secretary is satisfied that the consideration for conveyance was adequate; the grantor received the full consideration bargained for; and there is no evidence of fraud, overreaching, or other illegality in the procurement of the conveyance.

11 IBIA at 32, 89 I.D. at 661. Wishkeno also announced the Board's standard of review in appeals of this nature:

> [A] decision which shows proper regard to the applicable law and the facts at hand, whatever those facts may be, will not be set aside by the Board as it is not the Board's function to substitute its judgment for that of the agency in matters committed to agency discretion.

11 IBIA at 33, 89 I.D. at 661. See also Thornburg v. Acting Anadarko Area Director, 18 IBIA 239, 242 (1990). When a BIA decision is based on the exercise of discretion, the burden is on an appellant to show that BIA did not properly exercise its discretion. E.g., Ross v. Acting Muskogee Area Director, 21 IBIA 251 (1992).

Appellants contend that the Wishkeno standards were not met here. They also contend that (1) the Area Director improperly approved a copy of the deed, in the absence of the original; (2) the 1908 conveyance did not comply with the statutes and regulations then in effect concerning conveyances of trust allotted land; (3) the approval was untimely, arbitrary and capricious, and in conflict with the two Departmental probate decisions; and (4) the 1908 deed could not convey the homestead because Torres' wife did not agree to the conveyance in writing.

7/ This procedural step would not have been necessary if the Area Director, who actually made the decision, had given notice of his decision directly to appellants, as required by 25 CFR 2.7(a). See Parisian v. Acting Billings Area Director, 19 IBIA 109 (1990).

With respect to the Wishkeno factors, appellants contend that the Area Director lacked adequate evidence to reach the necessary conclusions concerning the 1908 conveyance.

The Area Director contends that he

> carefully considered all three of the factors enunciated in Wishkeno. * * * Faced with an incomplete historical record, muddled legal authority * * * and a difficult choice between ratifying a situation that has existed for more than eighty years or wreaking havoc in the life of a Pueblo (and in the lives of many of its members) by overturning a long-established status quo, [he] chose, in the exercise of his discretionary authority, to retroactively approve the conveyance.

(Area Director's Brief at 5). The Area Director's June 5, 1992, memorandum discusses the Wishkeno factors and their application to the case at hand:

> [T]his case clearly involves some unique circumstances. The most obvious concern is whether the first standard has been met, that the consideration for the conveyance was adequate. Standing alone it could easily be argued that even back in 1908, $1 was not adequate consideration for 120.88 acres. This is where we looked to the unique circumstances of this case to reach our conclusion that this first standard had been met. In a letter to the Superintendent of the Government Indian School in Santa Fe, New Mexico, dated May 16, 1902, the Special Attorney for the Pueblo Indians of New Mexico explained three ways in which the Pueblo of Jemez may acquire title to public lands, located outside the boundaries of the Pueblo of Jemez grant and reservation which contained a desirable spring. In that letter the Special Attorney suggested:
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> > Second, one of the Indians of the Pueblo of Jemez might take up this land as a homestead under the general homestead laws. This has been permitted by the Land Department in the case of some of the Laguna Indians, an instance being the case of Guachin Torres, a Laguna Indian who made homestead entry 2516 and secured final certificate 1923 . . . . patent therefore being issued to him on March 2, 1893. Torres subsequently conveyed this land to the Pueblo of Laguna, so that finally the Pueblo became the owner of it for community purposes . . . . (emphasis added).
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> The Special Attorney was mistaken as to the date, since at the time he wrote his letter, Mr. Torres had not yet completed the conveyance of his homestead to the Pueblo. Nevertheless, his letter is persuasive contemporaneous evidence that Mr. Torres

acquired his homestead in order to convey it to the Pueblo. The Special Attorney was familiar with the circumstances surrounding Mr. Torres acquiring the allotment in 1893. The fact that this Special Attorney was listing this as a means by which a tribe could obtain land with the assistance of a tribal member homesteading the land and then conveying it to the tribe and that it was specifically done at Laguna with Mr. Torres indicates Mr. Torres' intent may have been to acquire the land for the tribe. Under these circumstances $1 consideration would be adequate.

We feel the Special Attorney's selection of language can properly be interpreted to indicate the intent of the parties was for Mr. Torres to acquire the land by homestead and then convey the land to the Tribe. Unfortunately, Mr. Torres and the Tribe were not aware of the requirement of government approval of the deed in order to make the conveyance legal and binding. Nevertheless, the warranty deed was executed by Mr. Torres by affixing his mark to the deed and this action was verified by two witnesses. We agree with the Superintendent that the signing of the warranty deed carried out Mr. Torres' intent to complete the warranty deed and convey the property to the Pueblo of Laguna.

This is a unique situation, but the facts indicate a tribal member acquiring land under the Homestead Act to help his tribe and then conveying that land to the tribe. Then even after the conveyance he would still have been able to receive benefit from the land as a tribal member. This was done with the knowledge of the Special Attorney for the Pueblo Indians of New Mexico. This official did not object to this process, but instead recommended it to the Superintendent of the Government Indian School as an example by which other Pueblos could acquire land with the assistance of their tribal members. Under these unique circumstances and considering the relationship between the grantor and grantee, we feel the consideration for the conveyance was adequate and the consideration was received by Mr. Torres.

We also agree with the Superintendent that the documents do not indicate that there was any fraud, overreaching or other illegality in the procurement of the conveyance. Mr. Torres was evidently competent in the sense that he had the mental capacity to understand what he was doing because he was capable of and did go through the technical and administrative process of working with the government in order to acquire a Homestead Allotment. Additionally, Mr. Torres was conveying the land to his own tribe where he could continue to use and benefit from the land as a tribal member.

(Area Director's June 5, 1992, Memorandum at 2-3).

Appellants object in particular to the Area Director's reliance on the Special Attorney's letter. It is true that the attorney was incorrect in his belief that the conveyance had already taken place. It is also true, as the Area Director now concedes, that the letter was not necessarily evidence of Torres' intent in 1886 or 1893 when he applied for and obtained his homestead patent. It is certainly evidence, however, that, in 1902, 6 years prior to actually doing so, Torres had considered conveying the property to the Pueblo. It is also at least circumstantial evidence of his reason for doing so.

Appellants clearly have a different view of the evidence than the Area Director did. In order to carry their burden of proof, however, appellants must do more than put forth an alternative interpretation of the evidence. They must show that the Area Director exercised his discretion improperly.

The record demonstrates that the Area Director gave careful consideration to both the law and the facts at hand. It does not matter that the Board might reach a different conclusion if it were to reweigh the evidence. The Board is satisfied that the Area Director complied with the requirements of Wishkeno. Appellants have not shown that he exercised his discretion improperly.

Appellants also argue that the Area Director erred in approving a copy of the deed, rather than the original. This argument appears moot in light of the Pueblo's production of the original deed. The Board concludes that, if the Area Director did commit error in approving a copy of the deed, the error may easily be cured and is therefore no longer of any consequence.

[3] Appellants next argue that the Area Director lacked authority to approve the conveyance because it did not comply with the statutes and regulations in effect in 1908 concerning sale of allotted lands. 8/ Appellants contend, inter alia, that the conveyance failed to meet several requirements of the regulations: "[T]he petition of the allottee [to the Indian agent or other officer in charge], public notice, appraisal by the United States, payment of the appraised value, a diagram of the area to be conveyed, acknowledgment of the deed before the Indian agent, a full report by the agent, and payment of consideration to the United States rather than to the allottee" (Appellants' Brief at 13-14).

There is no dispute that the conveyance failed to comply with the literal requirements of these statutes and regulations. Given the fact that the conveyance was not approved, and was apparently made without the knowledge of BIA, it is hardly surprising that it failed to comply with these requirements, related as they are to the basic requirement of approval.

8/ The statutes cited by appellants are a 1907 act, codified at 25 U.S.C. § 405 (1988), and a 1908 act, codified at 25 U.S.C. § 404 (1988). The regulations they cite are titled "Regulations for Conveyance of Lands of Noncompetent Indians" and were approved by the Commissioner of Indian Affairs on Aug. 15, 1907.

But the Area Director's discretionary power to approve a conveyance retroactively would be meaningless if it did not include the power to determine that the fundamental purpose of the statutes had been accomplished, despite a lack of literal compliance with all their terms. Further, as far as the 1907 regulations are concerned the Secretary's discretion was explicitly preserved. The final paragraph of the regulations reads: "No proceedings or action under these regulations shall affect in any respect the right of the Secretary of the Interior to exercise the discretion given him by law relative to approval of deeds for these lands."

The Pueblo makes a more basic response to appellant's argument, contending that, in 1908, Pueblo Indians were not subject to the Federal laws and regulations concerning Indians and Indian lands. The Area Director describes the legal status of the Pueblos at that time as "anomalous." The history of the Pueblo Indians is complex, and it need not be addressed in any detail here. However, it is worth noting that the Supreme Court had held in 1877 that Pueblo lands were not protected by the Indian Trade and Intercourse Act. United States v. Joseph, 94 U.S. 614 (1877). Following Joseph, the Department of the Interior had come to consider various Federal Indian statutes inapplicable to the Pueblos; and, according to decisions of the New Mexico territorial courts, the lands of Pueblo Indians were freely alienable and taxable. 19 L.D. 316 (1894); Cohen, Handbook of Federal Indian Law, 387-88 (1942). Although this view of the Pueblos was gradually repudiated, the process of change did not begin until after 1908. 9/ It clearly appears that, in 1908, the generally held view was that neither Pueblo Indians nor their lands were subject to statutes concerning Indians, including those which required Federal approval of conveyances. 10/

It is arguable that, because the Federal laws concerning Indians were not deemed applicable to Pueblo Indians at the time Torres executed his deed, the deed was valid when made, and thus no retroactive approval is now required. The Area Director obviously proceeded upon the assumption that approval was necessary to validate the conveyance. The Board finds that,

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9/ In the 1910 New Mexico Enabling Act, Congress provided that, with respect to certain liquor prohibitions, "the terms 'Indian' and 'Indian country' shall include the Pueblo Indians of New Mexico and the lands now owned and occupied by them." Act of June 20, 1910, Sec. 2, 36 Stat. 557, 560. In 1913, the Supreme Court sustained the power of Congress to extend the Indian liquor laws to Pueblo lands. United States v. Sandoval, 231 U.S. 28 (1913). Finally, in the Pueblo Lands Act of 1924, 43 Stat. 636, and in United States v. Candelaria, 271 U.S. 432 (1926), Pueblo lands were unequivocally recognized as subject to Federal protection.

10/ As evidence of this view, the Area Director submits, inter alia, a copy of the 1910 deed from the Pueblo to the Atchison, Topeka and Santa Fe Railway Company, which was not approved by a Departmental official until 1930.

The circumstances of the Pueblos in 1908 could easily explain why the parties to the Torres deed did not seek Departmental approval.

once the Area Director determined that the conveyance to the Pueblo should be recognized, he properly approved it, thereby removing any doubt as to its validity.

Further, in accordance with the discussion above, the Board finds that in determining whether to approve the conveyance, the Area Director was not required to satisfy himself that the statutes and regulations concerning sale of allotted lands had been complied with in every detail. Rather, his task was to determine that the fundamental intent of the statutes had been fulfilled. The Wishkeno factors were developed to enable such an analysis, and the Area Director properly employed them for this purpose.

Appellants next contend that the Area Director's decision was arbitrary and capricious because it was in conflict with two Departmental probate decisions. They also contend that his decision was an untimely attempt to reverse the probate decisions.

The Area Director's decision had no effect on the determinations of heirs made by Judge McDonald and was clearly not an attempt to reverse her decisions. Approval of the deed does, however, affect the estate inventories.

[4] It has long been recognized that estate inventories may require correction after probate decisions have become final. Therefore, a procedure has been established by which inventories may be modified. See 43 CFR 4.273. Subsection 4.273(a) provides:

> When subsequent to a decision under § 4.240 [decision by an Administrative Law Judge] or § 4.312 [decision by the Board on appeal], it is found that property has been improperly included in the inventory of an estate, the inventory shall be modified to eliminate such property. A petition for modification may be filed by the Superintendent of the Agency where the property is located, or by any party in interest.

Given the Area Director's approval of the deed, a petition for modification of the inventories in the two estates should be filed. The Area Director states that he will file such a petition if the Board affirms his decision (Area Director's Brief at 27).

The Board rejects appellants' contention that the two probate decisions precluded the Area Director from approving the Torres deed retroactively.

Appellants' final argument is that the 1908 conveyance was invalid because, although the homestead was community property under New Mexico law, Torres' wife did not consent in writing to the conveyance. Appellants rely on Arnett v. Reade, 220 U.S. 311 (1911), in which the Supreme Court held that a 1901 New Mexico community property statute applied to property acquired before its enactment and that a wife's written consent to a conveyance of such property was therefore required. Responding to this contention, the Area Director points out that the 1911 Supreme Court decision

reversed a February 26, 1908, decision of the New Mexico Supreme Court, Reade v. De Lea, 14 N.M. 442, 95 Pac. 131 (1908). Under the law in effect when Torres executed his deed, the Area Director contends, the written consent of Torres' wife was not required. The Area Director also argues that, under the Supreme Court's policy concerning retroactive application of its decisions, the 1911 decision should not be deemed to apply to the Torres deed.

[5] The question of whether the 1908 conveyance was valid without the written consent of Mrs. Torres is actually a title question, which the Board has no authority to resolve. See Tsosie v. Navajo Area Director, 20 IBIA 108, 114 (1991). The Board therefore considers this matter only to the extent necessary to determine whether the Area Director should have considered the lack of consent by Mrs. Torres an impediment to his approval of the conveyance. 11/ The Area Director did not address this question in his decision. However, he has taken a clear position before the Board. A remand for the purpose of allowing him to address the matter would therefore be a useless exercise. The Board addresses the issue as if the Area Director's present position has been incorporated in his decision.

[6] It clearly appears that, under the New Mexico community property law, as it was understood in 1908, the written consent of a wife was not necessary to validate a conveyance of property acquired prior to enactment of the law. Assuming arguendo that the New Mexico law applied to a conveyance from Torres to the Pueblo, the Board considers whether the 1911 Supreme Court decision may reasonably be deemed non-retroactive in this case.

The Area Director cites Loeb v. Trustees of Columbia Township, 179 U.S. 472 (1900); Douglas v. Pike County, 101 U.S. 677 (1880), and Gelpcke v. City of Dubuque, 68 U.S. 175 (1863), in support of his argument concerning Supreme Court policy in 1911. In its more recent decision in Linkletter v. Walker, 381 U.S. 618, 629 (1965), the Court stated that it was "neither required to apply, nor prohibited from applying, a decision retrospectively" and that it must "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Citing Linkletter, inter alia, the Board stated in Smith v. Muskogee Area Director, 16 IBIA 153, 158 (1988):

> [T]he courts have looked to four factors in determining whether a change in law should be given retroactive effect: (1) the nature of the reliance placed upon the prior applications of law by the parties; (2) the harm or prejudice to those who relied upon previous principles of law; (3) the purpose of the law in light of public policy; and (4) the harm to the administration of justice or public purpose.

11/ This would be a concern only as to the Pueblo's title. Therefore, the Area Director's duty in this regard would be to the Pueblo.

See also Estate of Nellie Brown, 11 IBIA 1 (1982); Solicitor's Opinion M-36888, 84 I.D. 54, 62-64 (1976).

While it cannot be stated with certainty that Torres was specifically aware of and relied upon the then-controlling interpretation of New Mexico community property law, it seems apparent that both Torres and the Pueblo relied upon the validity of the deed as executed. The harm to the Pueblo resulting from a retroactive application of the Supreme Court's decision would clearly be substantial. Arguably, the interests of Torres would also be harmed, in that his intention would be thwarted. A counter-argument could be made, perhaps, that Torres would not be harmed, because a failure of his deed would result in his being able to pass the property to his descendants.

As to the public policy factors, there is a public interest in requiring a wife's participation in the conveyance of community property, although that interest cannot be served at this late date. There is a countervailing public interest in preventing such disruptions as would undoubtedly occur if the 1911 decision were applied retroactively here.

In Smith, the Board declined to give retroactive application to a Departmental change in interpretation of law. After analyzing the factors listed above, the Board noted that a party whose interests were affected (in that case, a testator) had no opportunity to alter his will to conform to the new interpretation.

Had the Area Director determined in 1992 to recognize a retroactive application of the 1911 Supreme Court decision, the long-dead Torres would, of course, have had no opportunity to take corrective action. Moreover, the four factors listed above, when applied to the extent possible in this case, disfavor a retroactive application of the 1911 decision.

The Board concludes that it is reasonable not to consider the 1911 Supreme Court decision retroactively applicable to Torres' deed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's July 14, 1992, decision is affirmed.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge